Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1277

A. L. BURBANK & CO., LTD., BANK OF TOKYO, LTD., and WESTWARD SHIPPING, LTD.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners A. L. Burbank & Co., Ltd., Bank of Tokyo, Ltd., and Westward Shipping, Ltd., having timely filed a petition in this Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit on March 8, 1976, respectfully submit this supplemental petition*

* Rule 24.5 of this Court indicates that for reasons such as hereinafter set forth a supplemental brief may be filed by any party while the petition for a writ of certiorari is pending. This would presuppose the prior filing of an original brief, which Rule 23.3 says is prohibited when a petition for a writ of certiorari is filed. The Clerk's Office of this Court has advised petitioners that for present purposes this supplement may be designated as a "supplemental petition" rather than a "supplemental brief".

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for a writ of certiorari, in order to call this Court's attention to a new case not available at the time of petitioners' filing of their original petition for a writ of certiorari. Petitioners respectfully submit that the new case provides an additional reason for this Court to grant a writ of certiorari; alternatively, petitioners respectfully submit that the new case warrants this Court in remanding this case to the Court of Appeals for reconsideration or clarification of that Court's opinion.

The applicable facts and decisions below are discussed in the original petition for a writ of certiorari (at pp. 7-16 thereof), and the contents thereof are respectfully incorporated herein by reference.

The New Case

In its appellate brief in the Court of Appeals, the Government argued that:

> "The very issue [present in this case] of whether the broad exchange of information language of a tax treaty will be limited by local law appearing to require dual tax investigations was faced in X v. *Eidgenossische Steuerverwaltung* (*The Federal Tax Administration*), 96(i) B.G.E. 737 (Official text), [1971] J.Trib. I, 571 (French translation), 71-1 USTC ¶9435 (unofficial English translation) (Dec. 23, 1970) [hereinafter X v. FTA]."*

The Government argued that in X v. *FTA*,

> "The Swiss Supreme Court interpreted the analogous Swiss-United States Tax Treaty in a manner

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* Brief for the United States, p. 15.

consistent with our view of the United States-Canadian Tax Treaty."*

The Government described the Swiss Supreme Court's decision in *X* v. *FTA* as involving the interpretation of "a virtually identical provision" as the exchange-of-information provision involved in the instant case.** The Government's reliance in the Court of Appeals on *X* v. *FTA* is clearly evidenced by its emphasis in its appellate brief (at pp. 15-17 thereof), in its reply brief in the Court of Appeals (at pp. 9-10 thereof), and in its oral argument in the Court of Appeals. Indeed, the Swiss Supreme Court's decision in *X* v. *FTA* was the only judicial decision cited by and relied upon by the Government as having been rendered by any court in any country in the world in support of the Government's argument that "other tax treaties similar to the United States-Canadian Tax Treaty . . . have been interpreted to authorize the exchange of information when only one state has a tax investigation."***

The decision of the Court of Appeals, while not expressly citing *X* v. *FTA*, relied upon and followed that decision's reasoning. The Swiss Supreme Court in *X* v. *FTA* held, in an excerpt quoted by the Government in its brief in the Court of Appeals (at p. 17 thereof), that under its interpretation of the exchange-of-information provision, "each contracting State agrees to furnish the contracting partner with information that it could obtain

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* Brief for the United States, p. 17.

** Brief for the United States as Cross-Appellee and Reply Brief for the United States as Appellant, p. 10.

*** Brief for the United States, p. 15.

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under the national law in force if the situation were reversed", a holding emphasized at great length by the Government in its briefs before the Court of Appeals and during oral argument. The Court of Appeals resultantly held:

> "We think the fair reading of the Treaty is that if Canada is investigating the tax liability of one who is potentially delinquent to it, then the United States may utilize the same investigative techniques that it would employ if that person were under investigation here for a domestic tax liability. To do otherwise would negate the very purpose of the Treaty." *United States* v. *A. L. Burbank & Co., Ltd., et al.*, 525 F.2d 9, 13 (2d Cir. 1975).

This reasoning by the Circuit Court, which followed the reasoning of the Swiss Supreme Court in *X* v. *FTA*, reflects the Circuit Court's adoption of the Government's argument that the Swiss Supreme Court's decision in *X* v. *FTA*, as the sole relevant judicial decision in the world on the issue then before the Circuit Court, should be followed by the Circuit Court—and it was so followed.

Petitioners have just learned, however, that the Swiss Supreme Court has substantially modified its decision in *X* v. *FTA*. Moreover, the Internal Revenue Service was a party to the proceedings in which the Swiss Supreme Court modified its decision, and, notwithstanding the fact that said modification preceded the Government's filing of its reply brief in the Court of Appeals and also preceded oral argument of this case in the Court of Appeals, the Government continued to urge the Circuit Court to follow the Swiss Supreme Court's decision in *X* v. *FTA* without informing the Circuit Court or petitioners of the later decision.

BLEED THROUGH

On May 16, 1975, the Swiss Supreme Court rendered a further decision in the same case officially reported at 101-(I) B.G.E. 160.

This opinion was first published in this country, in an unofficial translation, at 37 AFTR2d 76-1282, 1976 P-H Fed. ¶76-591 (published April 29, 1976). Although this decision was not available to petitioners, it was available to the Government, as a party to the decision, as of May 16, 1975, the date of the decision. The Government's reply brief in the Court of Appeals was filed on June 25, 1975, and oral argument was held on September 25, 1975; yet at no time did the Government advise the Court of Appeals or petitioners of the new decision, urging instead the Court to follow the original decision in *X* v. *FTA* rendered in 1970, without the slightest mention or hint of the later decision and its substantial modification of the first decision.

The Swiss Supreme Court, in its second opinion in *X* v. *FTA* (hereinafter referred to as "X. v. FTA(II)"), held that although (under its original *X* v. *FTA* decision) a contracting state to whom a request for assistance is made pursuant to an exchange-of-information provision in a tax treaty may transmit "information" to the requesting state, nevertheless (1) the tax treaty does not authorize use of compulsory process by the requested state for the purpose of obtaining documentary evidence and interrogating witnesses; (2) the tax treaty authorizes merely the transmittal of information, not the obtaining or transmittal of documentary evidence or transcribed testimony; and (3) the tax treaty was not intended as a vehicle for the contracting countries to provide a broad range of legal assistance by each country to the other. The Swiss Supreme Court expressly held:

> "It is essential, however, that the Federal Supreme Court [in the original *X* v. *FTA* decision] at that

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time didn't want to, and didn't have to, take a position on legal assistance rendered that was more than the transmission of information. . . . The official legal assistance stipulated within [the Treaty] should not however, through interpretation, be expanded into a comprehensive obligation of legal assistance. . . . Even though the Federal Supreme Court defined the scope of information obtainable and transmittable to the IRS somewhat differently than had been customary in prior administrative practice, nevertheless the contractually determined form of the granting of official assistance—namely the transmission of information—was not in question, but rather the only concern was the determination of the permissible content of such information. It doesn't follow from isolated phases in the [original *X* v. *FTA* decision] that the Court interprets [the exchange-of-information provision] as an obligation to give comprehensive legal assistance. . . . [T]he obligation to give official assistance under the text and purport of [the Treaty] is limited to the transmission of information and does not encompass specific steps of actual legal assistance. . . . Since the obligation to give official assistance under the text and purport of [the Treaty] is limited to the transmission of information and does not encompass specific steps of actual legal assistance, the additional investigatory actions [*i.e.*, the compelled production of documentary evidence and the questioning of witnesses] directed under the order of August 31, 1973 [of the Confederation Tax Administration] aren't covered by the contractual obligations. Therefore the challenged decision contravenes the Federal law and the Administrative Court appeals should be upheld."

The summonses in the instant case demand precisely what the Swiss Supreme Court in *X* v. *FTA(II)* held to be not authorized by the Treaty: the compulsory giving of testimony and production of documentary evidence. The Government, in urging the Court of Appeals to uphold the summonses based upon the authority of *X* v. *FTA*, simply concealed from the Court of Appeals that the Swiss Supreme Court, in its decision in *X* v. *FTA(II)*, expressly rejected the proposition urged by the Government that the Tax Treaty authorizes the use of compulsory process to obtain such testimony and compelled production of documents as is sought by the instant summonses. Thus, the Government in the Court of Appeals in this action urged that Court to follow a decision which it knew had been significantly modified, and which the Government further knew had been subsequently characterized by the very Swiss court in question as being a treaty interpretation that was "somewhat different than . . . customary". In short, the Government presented the Court of Appeals with a proposition of international law as set forth by the Swiss Supreme Court which the Government knew the Swiss Supreme Court had substantially retreated from and qualified in *X* v. *FTA(II)* without in any manner advising the Circuit Court of the decision in *X* v. *FTA(II)*, even though *X* v. *FTA(II)*, if followed by the Court of Appeals (as *X* v. *FTA* was), would invalidate the summonses at issue.

The Appropriate Relief

The Court of Appeals' mandate is ambiguous at this juncture. Although the Court of Appeals "reversed" the District Court's Order denying enforcement of the summonses, the Circuit Court's mandate does not state whether

the United States may transmit only "information" to Canada, or whether the United States may also transmit actual documentary or other evidence to Canada. Insofar as the Circuit Court's decision may be construed by the Government as authorizing the transmittal to Canada of more than "information", then the Circuit Court's decision would be in direct conflict with the decision of the Swiss Supreme Court in *X* v. *FTA(II)*. Thus, the Circuit Court's decision stands in direct conflict not only with Canada's own interpretation of the United States-Canada Tax Treaty (see Point I of petitioners' original Petition for a writ of certiorari), but would also conflict with Switzerland's interpretation of the exchange of information provision in the United States-Switzerland Treaty which the Government itself has recognized as being "virtually identical" to the United States-Canada Treaty.* The Circuit Court's opinion would therefore be in direct conflict with the interpretation of the exchange-of-information provision of the United States' tax treaties espoused by both of the United States' treaty partners which have ruled on the issue. It is respectfully submitted that this conflict between the United States' interpretation of the exchange-of-information provision and the interpretation placed upon the provision by Canada and by Switzerland warrants review and resolution by this Court.

Petitioners respectfully submit, as an alternative, that this case should be remanded to the Circuit Court, for two reasons. First, as noted above, the Circuit Court's mandate is ambiguous as to whether the United States may transmit to Canada not only "information" but also

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* See brief for the United States as Cross-Appellee and Reply Brief for the United States as Appellant, p. 10.

documentary and other evidence, or whether the United States may transmit to Canada only "information" (which was the limitation imposed by the Swiss Supreme Court in *X* v. *FTA(II)*). This issue was not presented to nor considered by the Circuit Court, and was therefore not ruled upon, because of the Government's failure to disclose to the Circuit Court the decision in *X* v. *FTA(II)*. Furthermore, remand to the Circuit Court is appropriate in order to permit that Court to reconsider its decision in view of the decision in *X* v. *FTA(II)*. It is respectfully submitted that where, as here, the Government has urged the Circuit Court to adopt—and the Circuit Court in fact adopted—the reasoning of the only foreign country that has judicially considered the issue; where that foreign country's highest court has substantially modified its decision; and where information concerning that modification has been withheld from the Circuit Court by the Government, then the Circuit Court should be given the opportunity to reconsider its decision.

A further reason warrants this Court in remanding this case. Additional recent events, which occurred subsequent to the decision below and which received worldwide publicity, justify petitioners' request in the alternative that this Court remand this case in order to permit additional factual information to be obtained concerning the initial refusal of the United States to honor the request of the Japanese and Italian Governments for information and evidence of alleged Lockheed Aircraft payments to Japanese and Italian officials. Japan and Italy are two of the eighteen other countries urged by the United States and noted by the Court of Appeals below as having exchange-of-information provisions identical to those in the United States-Canada Tax Treaty at issue (525 F.2d at 12, n. 2). To the extent the United States

disclaimed any such obligation—as it was publicly reported to have done—then that position would have been in direct conflict with the position of the Government urged and adopted by the Court of Appeals in this case.

CONCLUSION

For the above reasons, and for the reasons set forth in petitioners' original petition for a writ of certiorari, it is respectfully submitted that the original petition and this supplemental petition for a writ of certiorari should be granted. Alternatively, it is respectfully submitted that this supplemental petition for a writ of certiorari should be granted and the case should be remanded to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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